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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1931.

Docket No. 731.

SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD,

Petitioners-Appellants,

against

EDWARD J. FLYNN, Secretary of State of the State of New York,

Respondent,

and

JAMES A. FARLEY, Chairman of the Democratic State Committee,

Intervenor-Respondent.

RESPONDENT'S BRIEF

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Note: For Congressional debates, reports, tabulation of statutes, etc., reference is made herein to the appendix of the brief for appellants in Smiley v. Holm (Minnesota), now before the court.

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JAMES A. FARLEY, Chairman of the Democratic State Committee,
Intervenor-Respondent.

(A) JURISDICTION

The basis for calling upon the jurisdiction of this court in the instant appeal is said to be found in section 344 of the United States Code Annotated (§ 237 of the Judicial Code as amended). This court in the instant case has allowed a writ of certiorari. The claim made by the petitioners

appellants is that the instant case (1) questions the validity of a statute of the United States (Act of Congress, Aug. 8, 1911) and/or the validity of a State statute (ch. 890, Laws of N. Y., 1911); and (2) calls for an interpretation of Article I, section 4 of the Federal Constitution in relation to said statutes.

In order to sustain that position appellants must establish that there is presented (1) an issue for this court which cannot be determined without resort to a Federal statute and in which the latter is called in question, or (2) an issue in which a State statute runs counter to either a Federal statute or the Federal Constitution. It will be evident from a review of the facts and the law in the instant case that neither such circumstance nor issue is here presented.

(B) ORIGIN OF THE CASE

The Constitution of the State of New York is silent on the manner in which the function of fixing the boundaries of Representative districts for Congressional elections shall be exercised. In this respect, it differs from the constitutions of Minnesota, Utah, Virginia and others containing such provisions. (Virginia Constitution, Section 55; Utah Constitution, Section 1, Article 9; Minnesota Constitution, Article 4, Section 23). The New York Constitution does deal with the manner of the subdivision of the State into districts for its own State legislative bodies. In doing so, the New York State Constitution lays down certain reasonable rules of conduct which govern the said districting (Article III, Sections 4 and 5; see also §§ 3 and 4 of Act of Congress of Aug. 8, 1911).

From the beginning of its history up to April 10, 1931, the districting of New York State for Congressional representation has invariably been accomplished by statutory enactment:

Laws of 1789, Chap. 11,
Laws of 1792, Chap. 5,
Laws of 1797, Chap. 62,
Laws of 1801, Chap. 64,
Laws of 1802, Chap. 72,
Laws of 1804, Chap. 19,
Laws of 1808, Chap. 170,
Laws of 1812, Chap. 120;
Laws of 1818, Chap. 126,
Laws of 1821, Chap. 84,
Laws of 1822, Chap. 250,
Revised Statutes, Part I, Chap. II,
Title III, Laws of 1832, Chap. 334,
Laws of 1842, Chap. 325,
Laws of 1851, Chap. 490,
Laws of 1862, Chap. 454,
Laws of 1872, Chap. 619 (Passed over Governor's veto),
Laws of 1873, Chap. 798,
Laws of 1883, Chap. 424,
Laws of 1892, Chap. 295.
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Laws of 1902, Chap. 298,
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(Chap. 298, Laws of 1909),
Laws of 1911, Chap. 890,
Laws of 1915, Chap. 340,
Laws of 1917, Chap. 797,
Laws of 1917, Chap. 799,
Laws of 1918, Chap. 34,
Laws of 1918, Chap. 250,
Laws of 1922, Chap. 636.

On April 10, 1931, the Assembly and the Senate of New York State, by concurrent resolution, sought to accomplish the districting of the State into 45 districts for the election of Representatives to the Congress of the United States (Record 12, 37–58). The Attorney General advised the Secretary of State that this attempted procedure was invalid and that the said districts should not be certified for the purposes indicated therein (Record 67–85).

Petitioners thereupon instituted mandamus proceedings to compel the Secretary of State to

carry out the terms and provisions of the concurrent resolution (Record 8–9).

The petition itself did not reveal whether an alternative or a peremptory writ of mandamus was sought. The answer of the Secretary of State of the State of New York therefore denied the effectiveness of the concurrent resolution and set up affirmatively the existence and effectiveness of Chapter 890 of the Laws of 1911 of the State of New York; the uniform and reasonable course of conduct laid down by Sections 3 and 4 of the Congressional Act of August 8, 1911; and as a further defense, the lack of compactness, gross inequalities in numbers of inhabitants and lack of contiguity in the districts created by the said concurrent resolution. Upon the initial argument petitioners stated that they sought a peremptory order of mandamus and the order of the court in the first instance and upon appeal denied the said petition for a peremptory mandamus as a matter of law.

The Supreme Court of New York at Special Term, the Appellate Division and the Court of Appeals have all acted with unanimity in holding the said concurrent resolution invalid.

(C) OPINION OF THE COURT OF APPEALS

The Court of Appeals has laid down four grounds for declaring the concurrent resolution ineffective:

> (1) That the prescribing of boundaries of the districts for the election of Representatives is a function which, when exercised by a legislature, should be exercised by law (Record, 132); that such has been the uni-

form practice of New York and other States in the constitutional and legislative history of this country; that the distinction is clear between the exercise of a legislative function, such as the prescribing of rules of conduct for elections, and the mere expression of consent or dissent as in the ratification of appointments or amendments (Record, 133);

(2) That Chapter 890 of the Laws of 1911 of the State of New York is still effective to accomplish the districting of the State for purposes of the election of Representatives and has not been repealed (Record, 134);

(3) That the Congressional Act of August 8th, 1911, is still applicable insofar as it lays down just and reasonable rules for the districting of states for the election of Representatives, and is still in force as supplementing the provisions of the Act of Congress of June 18th, 1929 (Record, 133);

(4) That the provisions of Sections 3 and 4 of the Act of Congress of August 8, 1911, set up a just and reasonable rule to be followed, which has been recognized by similar enactments over a long period of years, and would be applicable to any districting by a State legislature "even if the statute does not govern *ex proprio vigore*" (Record, 135).

(D) ISSUES PRESENTED BY THIS APPEAL

The following questions are presented by the instant apeal:

(1) Is the determination of the State court conclusive upon the issues there decided?

(2) Is the function of districting a State for representation in the Congress of the United States one properly exercisable by the enactment of laws and not as here attempted by the mere resolution of the representative bodies of the State legislature?

(3) Do the provisions of Sections 3 and 4 of the Act of Congress of August 8, 1911, prevail under the Reapportionment Act of 1929 either (a) by the effectiveness of said sections through non-appeal, or (b) by the effectiveness of such provisions as a reasonable and just course of conduct to be pursued as a matter of sound public policy in the subdivision of States into districts for representation in Congress?

(E) SUMMARY OF ARGUMENT

Respondent Secretary of State of New York submits to this court:

The determination of the Court of Appeals of the State of New York, the court of last resort of that State, is conclusive to the effect that the said concurrent resolution of April 10, 1931, of the Senate and Assembly of the State of New York is ineffective to accomplish the districting of the said State for representation in the Congress of the United States;

That the function of subdividing the State into districts for the choice of Representatives in the Congress of the United States is one properly exercisable by the enactment of statute and not through resolution of only part of the law-making machinery of the State;

That the provisions of Sections 3 and 4 of the Congressional Act of August 8, 1911,

set up a just and reasonable course of conduct recognized by Congress and the States over a period of years and applicable to the districting by a State for representation in Congress;

That Chapter 890 of the Laws of 1911 of the State of New York is consistent with and not repugnant to any presently effective act of Congress and/or any provisions of the Constitution of the United States relating to the representation of the inhabitants of the State of New York in the Congress of the United States;

That the districts sought to be set up by the so-called concurrent resolution are violative of the principles of equality of representation, work a disfranchisement of a large proportion of the population of New York State, and deny to said population a just representation in the House of Representatives of the Congress of the United States.

POINT I

The determination of the Court of Appeals of New York is conclusive upon the issues determined.

The law-making power of the State of New York is vested by its Constitution in the Senate and Assembly and the Governor (New York Constitution, Art. III, §§ 14 and 15; *Doyle* v. *Hofstader,* 257 N. Y. 244 at 261).

Concurrent resolutions in the State of New York do not have the effect of law.

People v. *Palmer,* 12 Misc. 392; aff. 146 N. Y. 406
Doyle v. *Hofstader,* supra

Chapter 890 of the Laws of 1911 of the State of New York subdivided the said State into 43 districts for the election of Representatives in the Congress of the United States. It has been subsequently amended by the Laws of 1915, Chapter 340; Laws of 1917, Chapters 797–799; Laws of 1918, Chapters 34, 250; Laws of 1922, Chapter 636. Its constitutionality has been passed upon (*People ex rel. Fitzgerald* v. *Vborhies*, 222 N. Y. 494).

A law accomplishing districting does not expire or operate to repeal itself by virtue of the tardiness of the legislature in failing to enact a subsequent statute in due time, (*Rumsey* v. *People*, 19 N. Y. 41 at 50). Districting by legislative enactment is a continuous process and the preceding statute therefore remains operative until subsequent enactment has superseded it.

The Court of Appeals as the highest court of the State of New York has determined that Chapter 890 of the Laws of 1911 (N. Y.) is still effective for the purpose of accomplishing election of Representatives from 43 districts and that the two additional representatives from New York under the census of 1930 shall be elected at large (Record p. 134).

There is no conflict with any Federal Statute in this determination. It violates none of the provisions of the Act of Congress of June 18, 1929 which merely results in the allocation to New York of 45 Representatives. It is consistent with the Act of Congress of August 8, 1911, which latter the appellants herein claim to be entirely inoperative. We find no repugnance in this deter-

mination by the Court of Appeals nor in this State statute to Section 4, Article I of the Federal Constitution, which provides *inter alia* that the Legislature of the State shall "prescribe" the manner, etc. of the election of Representatives to Congress.

The Court of Appeals has further determined that the function of districting is one exercisable only under the law-making power of the State, subject to the veto power of the Governor. There is nothing in the language of Section 4, Article I of the Federal Constitution which indicates how the function shall be exercised in each State. What constitutes the "legislature" for the purpose of districting is likewise a matter which is not defined in the Federal Constitution and which has been determined in this instance by the court of last resort in the State of New York. Thus no reviewable issue is presented to this Court.

Davis v. *Hildebrandt,* 241 U. S. 565, 567–8
Detroit v. *Osborne,* 135 U. S. 492
Clairborne Co. v. *Brooks,* 111 U. S. 410
Koenig v. *Flynn,* 258 N. Y. 292 (the instant case).

Article I, Section 4 of the Federal Constitution provides:

> "Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or

alter such Regulations, except as to the Places of choosing Senators. * * *."

The Constitution of the United States represents a grant of powers to the central government from the sovereign States. Section 4, of Article I is a reservation by the States of the power to exercise the control of the times, the places and the manner of holding elections for Representatives with the power in Congress itself to lay down regulations or alter such regulations as the States may have imposed. It therefore remains for the States themselves to determine how the function therein reserved to the sovereign States shall be exercisable. It does not present a question of interpretation of the Federal Constitution for review by the Supreme Court of the United States. There is no indication in the language of Article I, Section 4, that the function therein referred to must be exercised by any particular part of the law-making body of the State, nor how the State "Legislature" shall be constituted. The determination of that question must be found in the State Constitution or in the determination of its highest court.

The concurrent resolution which is before this court in the instant appeal after setting forth the districts which it proposes to erect for the election of Representatives to the Congress of the United States, provides for the definition of Assembly districts, towns, wards, election districts, etc. (Exhibit D, fol. 163). It further proposes to set up a course of conduct for the canvassers of elections, which provisions are covered by the Election Law of the State of New York (Chap. 17,

Consolidated Laws, State of New York). The said resolution further provides "that the provisions of the election law, in so far as they are not inconsistent herewith, relating to the election of representatives from this state in congress, to fill vacancies by expiration of term or otherwise occurring or existing after the general election in the year 1932, shall continue in force until repealed, superseded or amended." (Record fol. 167.)

Obviously such a provision attempts to repeal whatever provisions of the Election Law might be inconsistent therewith. We therefore have presented here a doctrine for the repeal of a statute by resolution. It is clear under the Constitution of the State of New York that a statute cannot be repealed except by a law. It has been conclusively determined by that court, as hereinbefore set forth, that a concurrent resolution is not a statute.

People ex rel. Argus Co. v. *Palmer*, 12 Misc. 392; affd. 146 N. Y. 406.

The resolution therefore is ineffective not only to repeal the provisions of the Election Law, but ineffective to repeal Chapter 890 of the Laws of 1911 of the State of New York which prescribes 43 districts and from which representatives may be chosen without disturbing any Act of Congress now in force and without running counter to any of the provisions of the Federal Constitution.

POINT II

The process of prescribing the boundaries of districts for the election of Representatives to the Congress of the United States under Article I, Section 4, of the Federal Constitution, calls for the exercise of the law-making function.

(A) ARGUMENT FROM PRECEDENT

1. Historically we are confronted with the unanimous experience of all States from the inception of the National government in 1787 to the year 1931. In no State for the past one hundred and forty-five (145) years has there been any attempt to exercise the function of prescribing the boundaries of districts for the election of Representatives to the Congress of the United States in any manner other than by law.

The only instances which have been seized upon for example by the appellants herein are those of Massachusetts in the years 1788 and 1792. It appears that in those two years Massachusetts sought to district the State by resolution of the representative bodies of the Legislature. But these resolutions in both instances, the archives show to bear the signature of approval of John Hancock, then the Governor of Massachusetts. Under the Massachusetts Constitution as it existed up to 1794, a resolution of the legislature with the approval of the Governor had the effect of law (Ch. 1, Art. I, § 1–1780).

By the Constitution of the State of Maine today a resolution approved by the Governor has the effect of law, the only difference being in the number of readings before the Legislature (Maine Const. Art. IV, § 2). We find, however, that Maine has uniformly acted by statute.

It is therefore unquestioned, and the appellants herein have admitted, that the uniform experience of the States has been to prescribe districts by law, whether said law was effected by bill or by resolution with the approval of the Governor.

Reference has been made by the appellants herein to the State Constitutional Convention of Massachusetts of 1820 as authority for their contention. The said proceedings indicate that said Convention rejected a resolution proposing an amendment to the Massachusetts Constitution which would lay down rules limiting the discretion of the Legislature in the prescribing of the times, places, etc., for the election of Representatives in Congress by districts. Up to 1842 no Federal enactment referred to districts. Therefore the proposition was viewed as an attempt to limit the State Legislature by the State Constitution so as to necessitate districting. The opposition to such an amendment in no way indicates that the function of districting was not properly exercisable by law. Any attempt to draw such conclusion is indicative of a failure intelligently to read the debates before the Massachusetts Convention of 1820. (Hind's Precedents, Vol. 1, pages 653 ff.)

In addition to the uniform practice of the States in districting by law we find in certain States constitutional provisions making districting by law mandatory. For example, the Constitution of Virginia, Section 55, reads as follows:

> "*The General assembly shall by law apportion the State* to districts corresponding with the number of representatives to which it may be entitled in the House of Representa-

tives of the Congress of the United States; which districts shall be composed of contiguous and compact territory containing, as nearly as practicable, an equal number of inhabitants."

The Constitution of Utah, Section 1, Article 9, reads as follows:

"One representative in the Congress of the United States shall be elected from the state at large on the Tuesday next after the first Monday in November, A. D. 1895, and *thereafter at such times and places and in such manner as may be prescribed by law.* When a new apportionment shall be made by Congress the legislature shall divide the state into congressional districts accordingly."

The Constitution of Minnesota contains almost the same language as the Federal Constitution but does not indicate how the function shall be exercised. Article 4, Section 23, provides:

"The legislature shall provide by law for an enumeration of the inhabitants of this State in the year 1865 and every tenth year thereafter. At their first session after each enumeration so made and also at their first session after each enumeration made by the authorities of the United States the legislature shall have power to prescribe the bounds of congressional * * * districts * * *."

The New York State Constitution has no provision whatsoever concerning congressional districts. Despite the absence of constitutional mandate as found in the Constitutions of Virginia and

Utah, however, every State has without exception acted uniformly up to the year 1931 by statutory enactment.

New York State has so acted. (See page 3.)

The Constitution of the State of New York, however, in numerous instances provides that the "Legislature" may district or otherwise function in regard to various State governmental activities.

Article VI, Sections 1, 2, 9, 14, 16, 18 and 20 read as follows:

Section 1:

"The *legislature* may from time to time increase the number of justices in any judicial district. * * * The *legislature* may erect out of the Second Judicial District as now constituted another judicial district and apportion the justices * * *."

Section 2:

"The *legislature* shall divide the state into four judicial districts."

Section 9:

"The *legislature* may further restrict the jurisdiction of the Court of Appeals * * *."

Section 14:

"The *legislature* may hereafter enlarge or restrict the jurisdiction of the county courts."

Section 16:

"The *legislature* may * * * provide for the election of local officers * * * to discharge the duties of the County Judge and of the Surrogate in case of their inability * * *."

Section 18:

"Inferior courts of civil and criminal jurisdiction may be established by the *legislature* * * * The *legislature* shall not hereafter confer upon any inferior local court of its creation and equity or jurisdiction or any greater jurisdiction in other respects than is conferred upon county courts by or under the article."

Section 20:

"No judicial officer except Justices of the Peace shall receive to his own use any fees * * *. The *legislature* may impose a similar prohibition upon county judges and surrogates * * *."

In rendering effective these constitutional provisions the Senate and the Assembly of the State of New York have always acted by statute in conjunction with the Governor, and never otherwise. It cannot now seriously be contended that these functions, the power to exercise which is vested in the "legislature" of the State by its Constitution, could be performed by concurrent resolution. Yet the "legislature" consists of the Senate and Assembly.

So too in Missouri in regard to congressional as well as other districts, it has been held to be a matter of the exercise of "legislative authority" and not otherwise.

The Supreme Court of Missouri in *State ex rel. Barrett* v. *Hitchcock*, 241 Mo. 433, said:

"That the districting of the State into legislative, senatorial, congressional and

judicial districts is the exercise of legislative authority, cannot be successfully questioned. Authorities so hold, and it has been the uniform practice in this and all other states, in so far as I have been able to ascertain; that, too, has been the procedure with the United States Government. That authority is akin to, and flows from the same power and authority that fixes the boundary line of the State, and subdivides the State into counties, etc."

"We do not readily overturn the settled practice of the years." *Story* v. *Craig,* 231 N. Y. 33 at 40; *Matter of La Rocca* v. *Flynn,* 257 N. Y. 5 at 13; *Muller* v. *Oregon,* 208 U. S. 412, 420; *People* v. *Murray,* 149 N. Y. 367, 376.

The uniform practice of the states and the uniform provisions of Congressional acts comprising a uniform course of conduct are of substantial weight in the determination of the proper exercise of similar functions (*Briscoe* v. *Bank,* 36 U. S. 256, 318; *McPherson* v. *Blacker,* 146 U. S., 1, 36-7; *Stuart* v. *Laird,* 5 U. S. 298, 308).

(B) ARGUMENT FROM REASON

Legislatures function and have always functioned subject to certain checks which have also embraced resolutions before the latter might become effective.

Missouri Constitution, Art. V, Sec. 14.
Minnesota Constitution, Art. IV, Sec. 12.
Constitution of the United States, Art. I, Sec. 7.

Some of the duties entrusted to Legislatures may well have been of their very nature necessarily the subject of law-making; others merely the expression of choice or desire by the members of the said representative bodies.

Under the authority vested by Article I, section 4 of the Federal Constitution the State is called upon to determine the manner in which representatives shall be chosen. That authority is vested in the Legislature of the State by the said provision in the Federal Constitution. The function is of such importance that its exercise would naturally be considered subject to all the limitations placed upon the formal enactments of the representative bodies of the legislature. This would seem to be dictated by circumstances of policy irrespective of the historical background presented. Particularly should this be so where the veto of the Governor may be accepted as some assurance that representative bodies of one political faith will not be permitted to arrogate to themselves an undue preponderance of authority to further political aims and continue in power. It has always been the result of a desire to retain political ascendancy that gerrymandering has been the practice of the party in power under the necessity of guarding against eviction from control. Thus the Constitutions of Minnesota, Virginia and Missouri even provide that resolutions are not effective unless approved by the Governor. Resolutions with such approval are effective as law in Maine and were effective as law in Massachusetts prior to 1794.

Even in New York State the presentation of a concurrent resolution for the approval of the

Governor is not without legislative precedent (Assembly Journal 1923, p. 317; Senate Rule 18, Assembly Rule 6). Reapportionment has repeatedly been referred to as part of the "law-making power" of the State (Governor Flower, 1892—Messages, Vol. 9, p. 155; Public Papers Governor Charles E. Hughes 1907, p. 52: "It is not my purpose to propose a particular plan of apportionment. It is the function of the Legislature to formulate such plan and submit it by suitable bill for Executive action").

This message of the present Chief Justice of this court (then Governor of New York) was in reference to an apportionment of the State Legislature. The New York State Constitution (Art. III, sections 4 and 5) uses terminology quite similar to that in section 4, Article I of the Federal Constitution in that the power to prescribe the boundaries of districts and the power to "prescribe" the regulations are vested in the legislature. In both cases the Constitutions refer to the State "legislature." In both cases the word refers to the same body or bodies and reposes the identical authority, to wit: the power to district and redistrict. In the one case it is for congressional representation under the Federal Constitution; in the other case it is for State representation under the State Constitution. In both cases it is the same "legislature" which is to act. No sound reason exists to place upon the word a different significance and upon the function to be exercised a different significance when applied to one from that when applied to the other.

In the case of the constitutional provisions of Utah and Virginia will it be ventured by the ap-

pellants that these constitutional limitations are violative of the spirit or the letter of section 4, Article I of the Federal Constitution? The legislature is the creature of the State Constitution and is bound by the limitations therein. It is straining all powers of interpretation to hold that the provisions of section 4, Article I, which merely vest in the State legislatures a certain function, also defines the manner in which the function itself shall be exercised.

The argument is advanced by appellants that the use of the term "legislature" in section 4 of Article I of the Constitution refers solely to the representative bodies. They argue that the States at the time of the adoption of the Federal Constitution, with the sole exception of Massachusetts, did not permit of a veto by the Governor; they conclude therefrom that the use of the term in the Federal Constitution refers to the representative body and not to the law-making power.

The argument contains its own answer. Since the representative bodies of the State legislature were then the sole residuum of the law-making power, it is more reasonable to conclude that term was intended to indicate the law-making power. The two were synonymous. The legislative power under Article III of the Constitution of New York of 1777 was vested in the Senate and the Assembly with a revisory council consisting of the Governor, the judges of the Supreme Court and the chancellor. The veto power did not enter into the State Constitution until 1821. The framers of the Federal Constitution cannot be said to have foreseen every possible form which

State legislatures might take in the future. It does not follow, therefore, that we can ascribe to them a specific understanding that "legislature" meant the representative bodies as distinct from the law-making machinery. At least it is certain that since the legislature of each State is the creation of its Constitution, what constitutes that legislature and what constitutes the proper exercise of its function resides in the State Constitution or the court of last resort of the State in passing upon the legality of the acts of the legislature thereunder. As to New York, this has been set at rest by *Doyle* v. *Hofstadter*, 257 N. Y. 244, and *Koenig* v. *Flynn*, 258 N. Y. 292. Prior to 1931 we thought it had been set at rest by *Davis* v. *Hildebrandt*, 241 U. S. 565, and *Hawke* v. *Smith*, 253 U. S. 221.

The proper exercise of power to district for representation in legislatures is vital to the free and equal exercise of the franchise. No legislature should be able to pass laws effectually disfranchising large numbers of voters. Elections are equal only when the vote of each elector is as nearly as possible equal in power and influence to the vote of every other elector and where one ballot has no greater preponderance than the ballot of another. Any plan of districting, therefore, which is not based upon an approximate equality of inhabitants will work inequality in the right of suffrage and in the power of the ballot in elections of representatives. If not subjected, therefore, to all the checks of our governmental machinery this power is subject to the uncontrolled abuse of partisan factions momentarily in control of representative bodies of legislatures.

The very fact of an unbroken and continuous exercise of a governmental function under reasonable rules of conduct results in the creation of public confidence in said government. To destroy that confidence is to undermine the very fabric of our political structure. Equality of representation and of the power of the ballot are vital factors to public confidence in a representative form of government. Legalizing an unequal distribution of the power of the ballot not only breaks the continuity of governmental processes but also destroys the confidence of the people in the political institution itself.

Moran v. *Bowley,* 179 N. E. 526, at 531, 532.

By precedent and by reason a sound construction of the function of districting has been established. Why speculate on what the framers of the Constitution may have intended? One of the virtues of the noble document is the very quality which permits of a reasonable interpretation consonant with the changing features of our political life and with sound governmental processes.

> "Constitutional questions, it is true are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special

constitutional limitation goes is affected by the truth in respect to that fact; a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."

Muller v. *Oregon*, 208 U. S. 412, 420.
45 *Harvard Law Review*, 355, 360–364 and cases cited.

(C) ARGUMENT FROM THE CASES

Davis v. *Hildebrandt*, 241 U. S. 565 held the referendum as a part of the law-making power in Ohio effective to defeat an enactment providing for the districting of the State for Representatives in Congress. The court did also indicate in the case that the question of legislative power itself might well have rested upon the decision of the highest court of the State (p. 567–8).

"So far as the subject may be influenced by the power of Congress, that is, to the extent that the will of Congress has been expressed on the subject, we think the case is equally without merit. We say this because we think it is clear that Congress in 1911 in enacting the controlling law concerning the duties of the States through their legislative authority, to deal with the subject of the creation of congressional districts expressly modified the phraseology of the previous acts relating to that subject by inserting a clause plainly intended to provide that where by the state constitution and laws the referendum was treated as part of the

legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law."

Hawke v. *Smith*, 253 U. S. 221, holds that ratification of amendments is not subject to review by the referendum power, and points out the clear distinction between the legislative function of districting and the exercise of the ratifying power by the representative bodies of the State legislature:

> "It is true that the power to legislate in the enactment of the laws of a State is derived from the people of the State. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented." (p. 230.)
>
> "*Article I, § 4, plainly gives authority to the State to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required.*" (p. 231.)
>
> (Emphasis ours)

Hawke v. *Smith*, 253 U. S. 221 at 230, 231.

Moran v. *Bowley*, 179 N. E. 527

Schrader v. *Polley*, 26 So. Dakota 5; 127 N. W. 848
Rumsey v. *The People*, 19 N. Y. 41, 50
Carroll v. *Becker*, 45 S. W. (2nd) 533 (Advance Sheets March 1, 1932)
King v. *Augusta*, 277 U. S. 100.

The distinction between the exercise of the ratifying function by the legislature and other functions is further referred to in the following cases:

National Prohibition Cases, 253 U. S. 350
United States v. *Sprague*, 282 U. S. 716
McPherson v. *Blacker*, 146 U. S. 1.

See also for discussion in re districting processes:

Stiglitz v. *Shardien*, 40 S. W. (2nd) 315
Richardson v. *McChesney*, 218 U. S. 487.

Supported by an uniform and unbroken experience of the States, substantiated by sound reason and public policy, and, with the exception of *Smiley* v. *Holm* (Minn.), uniformly supported by Federal and State courts, districting for representatives is and should remain a function properly exercisable by the due enactment of laws and subject to all of the checks and balances of our governmental machinery. "Legislature" should mean the body acting under the reasonable limitations imposed for the particular function exercised.

POINT III

The course of conduct laid down by sections 3 and 4 of the Act of Congress of August 8, 1911, constitute a reasonable rule applicable to the apportionment of representatives under the Act of Congress of 1929.

Prior to and including the apportionment bill of 1842 representatives to Congress were apportioned on the basis of a numerical unit of inhabitants. In 1842 for the first time by Section 2 it was provided that the representatives be chosen from districts consisting of contiguous territory (5 Statutes at Large 491). Beginning with 1852, however, representatives were apportioned in accordance with a set number of representatives rather than in accordance with a unit of population, and from 1852 to date there were allocated to each State representatives dependent upon the proportion of the population to the number of representatives determined by Congress to constitute the House of Representatives. In 1852, however, the statute said nothing about districts (9 Statutes at Large 428; 10 Statutes at Large 25).

In 1872 the act provided for the election of representatives by districts consisting of contiguous territory and containing "as nearly as practicable an equal number of inhabitants." The said act further provided for the election at large in the event of an increased number of representatives the others "to which the State is entitled *by the districts now prescribed by law in said State.*"

In the Act of 1882 we likewise find the provision that where no change of representatives is indi-

cated they are to be elected in the States *"as now provided by law."* And in the same section it is further provided that additional representatives are to be elected at large and the others *"by the districts as now prescribed by law in said State,"* (22 Statutes at Large 5, Section 3).

Similarly in the Act of 1891 the language *"as now prescribed by law"* is used (26 Statutes at Large 735).

So too in the Act of 1901, where there is no increase, it is provided that the representatives from a State *"shall be elected from the districts now prescribed by law."* If the number is increased the additional representatives are elected at large and the others in the districts *"now prescribed by law until the legislature of such State* in the manner herein prescribed *shall redistrict such State"* (Sec. 4, Act of Congress January 16, 1901). It is further provided in the said section that if the number is less and there is no redistricting all are to be elected at large.

Thus for a half century prior to 1911 in every enactment of Congress apportioning representatives, the language used indicates clearly that it was accepted as established that the districts from which representatives were elected were *"prescribed by law"*; else why was such terminology uniformly adopted by Congress.

In the Act of 1911 this was merely extended by the use of the words "shall be redistricted in the manner provided by the laws thereof." The contention of appellants that the use of these words was intended to prescribe a course of legislative conduct, which, without them would not be imposed upon the State legislatures, is not well taken.

The Act of Congress of June 18, 1929, makes no reference to districts, nor to the manner of the choice of representatives.

Sections 3 and 4 of the Act of 1911 prescribe reasonable regulations for compactness, contiguity and equality of numbers of the districts from which representatives are to be chosen. The course of conduct thus laid down is in no way inconsistent with the provisions of the 1929 act, the repealer provision of which (Sec. 21) merely repeals those parts of other laws "inconsistent" therewith. Sections 1 to 21 of the Act of 1929 provide for a census. Section 22 provides for a formula for a Presidential apportionment. It expressly provides for its non-repeal in the event that Congress should fail to enact an apportionment after a subsequent census. The only addition in the 1929 Act outside of the census machinery is the provision for an automatic realignment of the number of representatives from the various States.

Section 3 of the Act of 1911 looks to the future, "each subsequent Congress" (See also *Rumsey* v. *The People*, supra).

It is respectfully submitted that the use of the words "under this apportionment" in the Act of 1911 as found in Sections 3 and 4, in no way limits the reasonable course of conduct therein prescribed as applicable to subsequent legislation, the provisions of which subsequent legislation merely provide for a repeal of inconsistent prior legislation.

There is no favored doctrine of implied repeal or substitution. The determinations of this court upon that question are quite emphatic. A literal

construction will not be substituted for a reasonable interpretation and where repeals by implication are not favored by the court, a reasonable construction rendering both acts consistent with one another will be adopted if possible.

U. S. v. *Greathouse*, 166 U. S. 601, 605.
U. S. v. *Lee Yan Tai*, 235 U. S. 213, 221.
Washington v. *Miller*, 235 U. S. 422, 428.
Woods v. *Supervisors*, 136 N. Y. 403, 409.
Matter of Tiffany, 179 N. Y. 455, 457.

Reference to the legislative debates as well as to the reports of the committees of Congress on the Act of 1929 lends support to the contention that Sections 3 and 4 of the Act of 1911 are not repealed by the Act of 1929 (Report of the Senate Committee on Commerce on Senate Bill No. 312, April 22, 23, 1929). Committee reports are clearly indicative of legislative intent and are so to be regarded by the courts.

Duplex v. *Deering*, 254 U. S. 443 at 474.
Oceanic Navigation Co. v. *Stranahan*, 214 U. S. 320 at 332.
Congressional Record, Vol. 71, Part 3, pages 2444, 2445, etc.

The situation which prompted the legislation may be ascertained to a certain extent from the debates.

Standard Oil Co. v. *U. S.*, 221 U. S. 1 at 50.

These debates and the committee reports expose the fallacy of the claim of implied repeal of Sections 3 and 4 of the Act of Congress of 1911 (Congressional Record, Vol. 71, Part 3, page 2445).

But even were the provisions of Sections 3 and 4 determined to have been repealed by implication or otherwise, nevertheless the course of conduct there laid down is reasonable and based upon sound public policy. It provides for contiguous, compact districts of as nearly equal as practicable a number of inhabitants. The Minnesota Supreme Court in *Smiley* v. *Holm* has determined that without such a course of conduct laid down by statute legislatures may district without regard to equality of representation. It is respectfully submitted that a gross abuse of such a reasonable course of conduct working the disfranchisement of large numbers of inhabitants would be violative of the provisions of the Fourteenth Amendment and destructive of sound governmental institutions.

The Court of Appeals of the State of New York has well said in the determination now for review before this court that the provisions of the said Act of Congress of August 8, 1911, would still be in force even if the act itself were ineffective. The course of conduct is "simple, direct and universal." The provisions embodied therein have been contained in previous congressional acts and reveal "a practical recognition by Congress of the just and reasonable rule to be followed in the absence of a statute, and that this rule should be followed even if the statute does not govern *ex proprio vigore*."

POINT IV

The districts attempted to be set up by the so-called concurrent resolution present a gross disregard for equality, compactness and contiguity which renders the said resolution in the absence of other considerations invalid.

It is respectfully submitted that the course of conduct for districts, laid down by the Constitution of the State of New York for its own districts (Art. III, Sections 4-5) should be applied by a parity of reasoning to an attempt by the Legislature to provide representation for the inhabitants of the State in the Congress of the United States. A gross disregard of the rights of the citizens to representation will not be permitted to go untouched by the courts and thus have the constitutional safeguards to representation swept away by political considerations of a Legislature which finds its desire to maintain political control thwarted by a diligent executive.

It is sufficient here to refer only to a few of the glaring incidents of inequality. New York State has, by the census of 1930, 12,588,066 inhabitants and New York is assigned forty-five Congressional representatives. New York City, by the census, is given 6,930,447 inhabitants. The rest of New York State represents 5,657,620 inhabitants. Despite a difference of almost 1,300,000 inhabitants between New York City and the rest of New York State, this so-called resolution apportions to the City of New York the same number of representatives (22½) as are apportioned to the balance of the State, *a difference which practically renders over one and a quarter million*

inhabitants powerless to obtain a reasonable and fair representation in the House of Representatives from New York State.

But that difference is not nearly so glaring as is the gross inequality which is created by individual districts. Take, for example, the districts created out of Kings County. Kings County, by the census, is assigned 2,560,401 inhabitants. Kings County could, by a fair subdivision, be entitled to nine full districts of 284,489 inhabitants each, more than the unit provided by the division of the State census into 45 equal parts which would furnish a unit of 279,734 inhabitants. Disregarding entirely this fair subdivision of Kings County, the so-called Concurrent Resolution gives to Kings County eight districts and those eight districts, as pointed out in Exhibit 3 of the answer, furnish glaring *inequalities ranging from the ninth district with* 202,633 *inhabitants, over* 70,000 *below the unitary basis of forty-five districts, to the fourteenth district with an inhabitant population of* 484,893, *over* 200,000 *more than the unitary basis in an equal division of the State into forty-five districts.*

The County of New York, by the fifteenth census, is given 1,867,312 inhabitants which would, under the unitary basis of forty-five equal districts, be entitled to approximately 6½ representatives. New York County should be subdivided into six districts with a surplus available for combination with Bronx County, adjoining, to permit of a fair and equal distribution of the population and districts. However, we find the Legislature by this Concurrent Resolution, divid-

ing New York County into six districts with a *range of population from* 249,292 *in the seventeenth to* 387,067 *in the very next adjoining district, the sixteenth.*

The inequalities between the individual districts in the four districts assigned to the Bronx are not so apparent although it is significant that each district assigned to the Bronx is given more than 30,000 more inhabitants than the unitary basis of forty-five equal districts would apportion.

In any equitable division districts are not supposed to vary unreasonably from the figure given as a unit for population. This is approximately 280,000 for each Representative. From an examination of the resolution passed by the Legislature it is seen that the seven most populous counties of the State have the following representation, population and average population per district:

County	Representation	Population	Average population to district
Kings	8	2,560,401	320,051
New York	6	1,867,312	311,218
Bronx	4	1,265,258	316,314
Queens	4	1,079,129	269,782
Erie	3	762,408	254,136
Westchester	2	520,947	260,473
Monroe	2	423,881	211,940

Dividing the population of each county by the quota 280,000, we find an equitable division of districts would result in the following county representation, population in excess being given also:

County	Representation	Population in excess
Kings (Brooklyn)	9	40,000
New York (Manhattan)	6	197,000
Bronx	4	145,000
Queens	3	239,000
Erie (including Buffalo)	2	202,000
Westchester	1	240,000
Monroe (including Rochester)	1	143,000

The excess of 197,000 in New York could easily be combined with the excess of 145,000 in the Bronx to make compact districts with an excess of 50,000 which could be combined with the next adjoining county of either New York on the one side or Westchester on the other. Similary Monroe County with 423,000 deserves more than one district but certainly not two for which it should have a population of 560,000. It is unfair manifestly to give this county two representatives when it could easily be combined for its excess from one district with the adjoining county to create another. New York City with 6,930,447 receives representation equal to the rest of the State with a population of over one million and a quarter less. The under-representation of Brooklyn is most unfair. Twenty-four representatives instead of twenty-one or twenty-two would be nearer to accuracy and equality.

To continue to detail such inequalities would be superfluous. The foregoing are sufficient to indicate that the so-called Concurrent Resolution creates inequalities in numbers grossly violating the spirit of the Constitution of the State and of the United States as well as the letter of the law.

(F) CONCLUSION

It is time that purity of purpose with which the framers of the Constitution viewed the business of Congressional representation be brought to the fore. That purpose of equality of representation should not be surrendered for all time into the hands of that political group which dominates while an apportionment happens to be made. It is not necessary for the political party system to belittle the legislative function of the States by attempting to accomplish unfair representation through unconstitutional means.

The so-called Concurrent Resolution of the Senate and Assembly of the State of New York of April 10, 1931 is invalid and ineffective. It is contrary to the overwhelming weight of precedent and authority, opposed to the whole legislative history of Congressional redistricting of the forty-eight states from the inception of this government to 1931. It is opposed to the legislative and constitutional history of the State of New York. It is contrary to and in violation of the acts of Congress of August 8, 1911 and June 18, 1929 and of chapter 890 Laws of New York 1911. It so grossly violates the reasonable course of conduct which should govern legislative redistricting in the matter of equality of numbers, compactness of districts and certainty of boundaries, that the said so-called Concurrent Resolution denies a fair and equal representation to the inhabitants of the State of New York.

The determination of the Court of Appeals of the State of New York should not be disturbed and the judgment and order of that Court here appealed from should here be affirmed.

Respectfully submitted,

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